

Respondent and its insurance carrier contend Judge Avery erred. They argue the Judge exceeded his jurisdiction by conducting the preliminary hearing outside of Douglas County. They contend that the proper venue for preliminary hearings, except those concerning accidents that occur out-of-state, is the county in which the accident occurred. They also argue the Judge failed to formally designate Shawnee County as the county where the preliminary hearing would be held. Finally, they argue that they were not afforded the opportunity to present evidence. Accordingly, respondent and its insurance carrier request the Board to strike the evidence presented at the hearing and to remand the claim to the Judge with instructions to conduct the preliminary hearing in the county of proper venue. They also request the Board to assess costs against claimant's counsel for knowingly proceeding to preliminary hearing in a county where venue did not properly lie.

Conversely, claimant contends the appeal should be dismissed. Claimant argues this appeal is frivolous. Accordingly, claimant requests the Board to assess attorney fees against respondent and its insurance carrier for the time spent participating in this appeal.

The only issues before the Board on this appeal are:

1. Does the Board have jurisdiction in an appeal from a preliminary hearing order to address the issue of which county is the proper venue for a preliminary hearing?
2. If so, did the Judge err by conducting a preliminary hearing in Shawnee County, Kansas, when the accident occurred in Douglas County, Kansas?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

The appeal should be dismissed.

This is an appeal from a preliminary hearing order. The issue raised by respondent and its insurance carrier questioning the proper venue to conduct a preliminary hearing is not a jurisdictional issue that is subject to review from a preliminary hearing order.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact at the preliminary hearing stage of a claim is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction. K.S.A. 44-551. This includes review of the preliminary hearing issues listed in K.S.A. 44-534a as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.¹

The issue of whether a judge conducts a preliminary hearing in the county of proper venue is not a jurisdictional issue listed in K.S.A. 44-534a. Additionally, that issue is a question of law and fact over which an administrative law judge has the jurisdiction to determine rightly or wrongly.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon

¹ See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.²

Accordingly, Judge Avery did not exceed his jurisdiction by determining that the preliminary hearing should be conducted in Shawnee County, Kansas. The Workers Compensation Act specifically provides that a judge may designate where preliminary hearings are held. The preliminary hearing statute provides:

Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge. . .³

Respondent and its insurance carrier's contention that the Judge failed to designate Shawnee County as the location for the preliminary hearing is without merit. Furthermore, respondent and its insurance carrier's contention that they were not afforded the opportunity to present evidence is likewise without merit as they received timely notice of the time and place of the preliminary hearing.

Both attorneys have requested the Board to assess costs against the other for improper conduct. That issue was not addressed by the Judge in the preliminary hearing Order for Compensation and, therefore, is not one that the Board will address in this appeal. In the event any party believes that there has been a fraudulent or abusive act, that party is directed to the fraud and abuse procedures set forth in the Act.

WHEREFORE, the Board dismisses respondent and its insurance carrier's appeal of the October 3, 2001 Order for Compensation entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of November 2001.

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

² *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

³ K.S.A. 44-534a.